

in his opinion, would properly be attributed to the complaints which she had made against her husband. In my judgment, this appeal ought to succeed.

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VAISEY J. I agree with all that my Lords have said, and with their conclusion that the wife's appeal in this case must be allowed. The indecent conduct of the husband towards the wife's own daughter was, as the commissioner found, not done in order to hurt the wife, but it had that consequence, as the evidence quite clearly shows, and as the husband must have known that it would or might. In my judgment, that is quite sufficient to establish the wife's right to a decree.

Appeal allowed.

Decree nisi pronounced.

Solicitors: *Kinch & Richardson for L. B. Fagot & Tillyard, Cardiff.*

P. B. D.

[HIGH COURT OF CHIVALRY.]

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The Duke
of Norfolk,
Earl Marshal,
Lord Goddard
D.C.L.
(sitting as
Assessor and
Surrogate).

Court of Chivalry—Jurisdiction—Existence—Jurisdiction in matters relating to armorial bearings—Right to bear arms a dignity not cognizable by the common law—Jurisdiction of court in complaints relating to usurpation of armorial bearings—Use of arms of city on common seal of company—Display of arms of city in theatre—Use of arms on common seal legitimate cause of complaint—Display of arms as decoration not a ground for intervention—8 Ric. 2, c. 5—13 Ric. 2, st. 1, c. 2.

The jurisdiction of the court of chivalry in matters relating to armorial bearings, as evidenced by the records of the court and the communis opinio among lawyers, is still extant. The statutes 8 Ric. 2, c. 5 and 13 Ric. 2, c. 2 were intended to confine the court to matters of dignity and arms and to prevent it from entertaining matters cognizable by the ordinary courts of the kingdom, but, since the right to bear arms is a dignity and not property within the

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true sense of the term, and is not a matter cognizable by the common law, the court of chivalry has jurisdiction to deal with complaints relating to the usurpation of armorial bearings. That jurisdiction, however, should be exercised only when there is some substantial reason, for practices and usages which have prevailed for many years must be taken into account and armorial bearings have been widely used as a decoration or embellishment without complaint, and it would not be right nowadays for the court to be put in motion merely because arms were displayed by way of decoration or embellishment.

Where, therefore, the Corporation of Manchester alleged and complained that the defendants, the Manchester Palace of Varieties Ltd., had over a period of years usurped the achievement granted to the corporation by displaying a representation of the corporation's arms on the pelmet above the main curtain in the auditorium of the Palace Theatre, Manchester, and by using them as their common seal, and the defendants, whilst admitting the allegations, denied that the matter was within the jurisdiction of the court:—

Held, (1) that the court had jurisdiction;

(2) that, though it was doubtful whether the display of the arms in the auditorium of the theatre was alone a ground for intervention by the court, the corporation of a great city could properly object to their arms being used on any seal but their own, for a deed sealed with an armorial device was thereby authenticated as the act and deed of the person entitled to the arms. The use of the arms of the city on the defendants' seal looked like an attempt to identify themselves with the corporation of the city, and was a legitimate subject of complaint, and therefore, the court could properly inhibit and enjoin the defendants from any display of the corporation's arms.

Observations on desirability of statutory regulation of the proceedings of the court.

CAUSE OF INSTANCE.*

The plaintiffs, the Manchester Corporation, were incorporated by Royal Charter dated October 23, 1838, and on March 1, 1842, were granted and assigned by the then Garter Principal King of Arms, the then Clarenceux King of Arms and the then Norroy

* *Reporter's note*.—Officers of Arms (Chester, York, Somerset and Lancaster, Heralds, and Bluemantle and Rouge Dragon, Pursuivants) were in attendance on the court. Before the proceedings began the Earl Marshal's style was proclaimed and letters patent of James I of August 1, 1622, and Charles II of October 19, 1672, were read, followed by the reading of the instrument of appointment of Lord Goddard as lieutenant, assessor and surrogate, and that appointing the joint registers. The Earl Marshal, the lieutenant, assessor and surrogate, and the joint registers then made declarations of office, and the case was called. The hearing took place in the Lord Chief Justice of England's Court in the Royal Courts of Justice and not, as stated in the citation (*infra*), in the Hall of the College of Arms.

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King of Arms the following arms: Gules, three bendlets enhanced or, a chief argent, thereon on waves of the sea a ship under sail proper; and for the crest, on a wreath of the colours, a terrestrial globe semée of bees volant all proper, together with the motto "Concilio et labore," to be borne and used for ever thereafter by the Mayor, Aldermen and Burgesses of the Borough of Manchester and their successors on seals, shields, banners or otherwise according to the laws of arms. On March 2, 1842, the Garter Principal King of Arms granted and assigned to the plaintiffs the supporters following: On the dexter side, an heraldic antelope argent, attired, collared and chain reflexed over the back or, and on the sinister side a lion guardant or, murally crowned gules, each charged on the shoulder with a rose of the last, to be borne and used for ever thereafter by the Mayor, Aldermen and Burgesses of the Borough of Manchester and their successors on seals, shields, banners or otherwise according to the laws of arms. By Royal Charter, dated March 29, 1853, the plaintiffs were constituted a city and by Royal Warrant dated August 3, 1893, the chief magistrate of the city was authorized to assume and use the style, title and appellation of Lord Mayor of Manchester.

From May, 1953, to April, 1954, the defendants, Manchester Palace of Varieties Ltd., the occupiers of the Palace Theatre, Manchester, a building open to the public, publicly displayed representations of the plaintiffs' armorial bearings on a pelmet above the main curtain in the auditorium of the theatre and also on their common seal. On April 13, 1954, the plaintiffs, by their town clerk, wrote requesting the defendants to cease the display of the representations of their armorial bearings; on April 21, 1954, the defendants wrote to the plaintiffs stating that they did not admit the plaintiffs' right to require them to cease the display, and that they did not propose to do so.

On May 5, 1954, the plaintiffs petitioned the Earl Marshal¹ that process might be awarded, complaining that the display of

¹ "To the Most Noble Bernard Marmaduke, Duke of Norfolk, Knight of the Most Noble Order of the Garter, Knight Grand Cross of the Royal Victorian Order, Earl Marshal and Hereditary Marshal of England, and one of Her Majesty's Most Honourable Privy Council.

"The Humble Petition of the Lord Mayor, Aldermen and Citizens of the City of Manchester.

"Sheweth:

"1. That your petitioners are a body corporate and lawfully bear for arms: gules, three bendlets enhanced or, a chief argent, thereon on waves of the sea a ship under sail proper, and for crest: on a wreath of the colours, a

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representations of their armorial bearings by the defendants was without their leave or licence and contrary to their will, and that the defendants continued and threatened to continue the display, whereby they were greatly disparaged. On October 20, 1954, the citation was issued.

"terrestrial globe semée of bees volant all proper, and for supporters: on the dexter side, an heraldic antelope argent, attired, collared and chain reflexed over the back or, and on the sinister side, a lion guardant or, murally crowned gules, each charged on the shoulder with a rose of the last.

"2. That Manchester Palace of Varieties Limited whose registered office is at the Palace Theatre, Whitworth Street, in the City of Manchester (hereinafter referred to as 'the company'), are the occupiers of a certain building known as the Palace Theatre, Whitworth Street, aforesaid, open to members of the public and therein display and have displayed publicly on a pelmet above the main curtain in the auditorium without the leave or licence and contrary to the will of your petitioners representations of the said arms, crest and supporters or of arms, crest and supporters differing from the said arms, crest and supporters in no material respect, contrary to the laws and usages of arms.

"3. That the company display and have displayed upon their common seal without the leave and licence and contrary to the will of your petitioners representations of the said arms, crest and supporters or of arms, crest and supporters differing from the said arms, crest and supporters in no material respect, contrary to the laws and usages of arms.

"4. That notwithstanding your petitioners' request to cease the display of the said representations of arms, crest and supporters as aforesaid the company have continued and threaten to continue the display thereof, whereby your petitioners are greatly disparaged.

"WHEREFORE YOUR PETITIONERS HUMBLY PRAY that your Grace may be pleased to award process against the company to appear and answer the premises in Your Grace's High Court of Chivalry or Court Military and that thereupon such course may be taken for your petitioners' reparation as Your Grace shall think fit.

"And your petitioners will ever pray, etc.

"Dated this fifth day of May, one thousand nine hundred and fifty-four.

L. S.

"Let Process be issued as is desired."

(Sgd.) NORFOLK, E.M.

"The Most Noble Bernard Marmaduke, Duke of Norfolk, Knight of the Most Noble Order of the Garter, Knight Grand Cross of the Royal Victorian Order, Earl Marshal and Hereditary Marshal of England, and One of Her Majesty's Most Honourable Privy Council.

"To all and singular justices of the peace, sheriffs, bailiffs, constables, officers and other faithful subjects of the Queen's Majesty, greeting:

"WE HEREBY COMMAND YOU to cite or cause to be cited peremptorily by such ways and means so as in all probability the party to be cited may come to the knowledge thereof Manchester Palace of Varieties Limited, whose registered office is at the Palace Theatre, Whitworth Street, in the City of Manchester, that they enter an appearance in the registry of our High Court of Chivalry or Court Military situate at the College of Arms, Queen Victoria Street in the City of London within fifteen days after service hereof and that they appear before Us or Our Lieutenant or other Judge

By their libel the plaintiffs propounded by way of complaint in law that the defendants had in the Palace Theatre publicly before many worthy persons displayed on the pelmet above the main curtain in the auditorium without the leave or licence and contrary to the will of the plaintiffs representations of the plaintiffs' arms, crest, motto and supporters, or of one or more of them, or of arms, crest, motto and supporters differing from their arms, crest, motto and supporters in no material respect, contrary to the laws and usages of arms, and had displayed similar armorial bearings upon their common seal; that the facts and allegations [as set out above] were true, public and notorious, and thereof there was, and continued to be, a public voice, fame and report. The plaintiffs prayed for right and justice, and that the defendants might be compelled to make to them full satisfaction and restitution of their honour and that they might be condemned in the costs of the suit incurred by the plaintiffs and condemned to whatever further might be requisite according to the laws and customs of arms and of the court by the definitive sentence of the Earl Marshal. The plaintiffs propounded the

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"lawfully constituted in our said court to be holden in the Hall of the College of Arms aforesaid on the next court day thereafter to answer a complaint by the Lord Mayor, Aldermen and Citizens of the City of Manchester (hereinafter called 'the plaintiffs') that the said Manchester Palace of Varieties Limited have in a certain building known as the Palace Theatre, Whitworth Street aforesaid displayed publicly on a pelmet above the main curtain in the auditorium without the leave or licence and contrary to the will of the plaintiffs representations of the arms, crest and supporters lawfully borne by the plaintiffs or of arms, crests and supporters differing from the said arms, crest and supporters in no material respect, contrary to the laws and usages of arms, and to show good and sufficient cause why such course should not be taken for the plaintiffs' reparation as to Us shall seem meet

"AND that you certify to Us or Our Lieutenant or other Judge lawfully constituted with these presents what you have done in the premises.

"DATED the 20th day of October in the third year of the reign of Our Sovereign Lady Elizabeth the Second, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Her Other Realms and Territories Queen. Head of the Commonwealth, Defender of the Faith, and in the year of Our Lord one thousand nine hundred and fifty-four.

"L.S.

"(Sgd.) NORFOLK,

"E.M."

"I, the undersigned, hereby certify that this citation was duly executed by me on the 25th day of October one thousand nine hundred and fifty-four by showing the same to one William Bolton Esq., M.B.E., Solicitor of Messrs. Boote, Edgar and Co., the solicitors for the Manchester Palace of Varieties Limited and leaving with him a true copy thereof at his office, 53 Spring Gardens in the City of Manchester.

"(Sgd.) FELIX E. CROWDER,

"Solicitor."

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premises jointly and severally not binding themselves to the burden of superfluous proof and saving to themselves the benefit of the law in all things.

By their answer the defendants admitted that they had displayed a representation of the plaintiffs' arms, crest, motto and supporters at the Palace Theatre and upon their common seal, but denied that such display was contrary to the law, usages or customs of arms, or that the armorial bearings in question might not be displayed in the manner complained of without the leave or licence of the plaintiffs. They made no admission as to whether the display was contrary to the will of the plaintiffs, but alleged that the armorial bearings had been displayed by them at the Palace Theatre for upwards of 20 years, and upon their common seal for 60 years or more, and that, until the town clerk's letter of April 13, 1954, no complaint with regard to such display had been made by the plaintiffs, nor by the Kings of Arms. They further denied that the allegations propounded by the plaintiffs by way of complaint in law were true public and notorious.

The defendants contended that the matter did not fall within the jurisdiction of the court as defined by the statutes of 8 Ric. 2, c. 5, and 13 Ric. 2, st. 1, c. 2,² and that, albeit relating to the display of armorial bearings, it was not a matter in respect of which the court could or ought to exercise jurisdiction, save to

² 8 Ric. 2, c. 5 (1384): "And because divers pleas concerning the common law, and which by the common law ought to be examined and discussed, are of late drawn before the constable and marshal of England, to the great damage and disquietness of the people; it is agreed and ordained, that all pleas and suits touching the common law, and which ought to be examined and discussed at the common law, shall not hereafter be drawn or holden by any means before the foresaid constable and marshal, but that the court of the same constable and marshal shall have that which belongeth to the same court, and that the common law shall be executed and used, and have that which to it belongeth, and the same shall be executed and used as it was accustomed to be used in the time of King Edward."

13 Ric. 2, st. 1, c. 2 (1369): "... because that the commons do make a grievous complaint, that the court of the constable and the marshal hath encroached to him, and daily doth encroach contracts, covenants, trespasses, debts, and detinues, and many other actions pleadable at the common law, in great prejudice of the King and of his courts, and to the great grievance and oppression of the people; our Lord the King ... hath declared in this parliament ... the power and jurisdiction of the said constable, in the form that followeth: To the constable it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the common law, with other usages and customs to the same matters pertaining, which other constables heretofore have duly and reasonably used in their time."

dismiss them from the suit. Accordingly, they prayed that they might be dismissed from the suit and that the plaintiffs might be condemned in the costs incurred on the part of the defendants, and condemned also to whatever further might be requisite that right and justice might be done.

Alternatively, in general and of grace, not binding themselves thereby to the burden of superfluous proof and saving to themselves the benefit of the law in all things, the defendants contended that the display by them of the armorial bearings granted to the plaintiffs was not contrary to the laws, usages or customs of arms on the grounds (1) that by the decisions in *Russel's Case* ³ and in *Oldis v. Donmille* ⁴ it was held that private persons were not punishable by or answerable to proceedings in the Court of Chivalry for assuming to and upon themselves to make arms, order funerals without authority, and paint arms contrary to heraldry, and that, *mutatis mutandis*, the present matter fell within those decisions; and (2) that the display of armorial bearings by a person other than the grantee or a person to whom they had been allowed or otherwise authorized by the King of Arms was not of necessity a denial of such grant or allowance or other authority, and was not of necessity a denial of such rights as the grantee or other person had or was proclaimed to have by virtue of the grant or allowance or other authority, and was not in itself an assertion that the arms were those of the person who displayed them or were his to the exclusion of the grantee or other person. Accordingly, they prayed that they might be dismissed from the suit and that the plaintiffs might be compelled to make full satisfaction and restitution of their honour, and that they might be condemned in the costs of the suit incurred by the defendants, and condemned to whatever further might be requisite according to the laws and customs of arms and of the court by its definitive sentence.

The definitive sentence porrected by the plaintiffs was that the court should pronounce decree and declare that the plaintiffs lawfully bore the arms, crest, motto and supporters in the cause libellate, and that the defendants had displayed representations of them in the manner libellate without the leave or licence and contrary to the will of the plaintiffs and the laws and usages of arms, and that the court should "inhibit and strictly enjoin the" defendants that they do not presume to display the said arms,

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³ (1692) 4 Mod.Rep. 128.

⁴ (1695) Show.P.C. 74.

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"crest, supporters and motto or any of them without the leave
"and licence of the plaintiffs," and that the defendants should
be condemned in costs.

The definitive sentence porrected by the defendants was that
the court should "pronounce decree and declare that the defen-
"dants ought of right to be dismissed and absolved from the claim
"and demand of the plaintiffs touching the matter set forth or
"claimed in the said pretended libel," and that they should be
dismissed and absolved accordingly, and that the plaintiffs should
be condemned in costs.

Costs on each side were agreed at £300.

Squibb, for the plaintiffs, formally exhibited the grant of
arms. The statutes of Richard 2 constituted general limitations
on the jurisdiction of the court, which had been meddling in
matters belonging to the common law, but it is submitted that
as regards other matters the court is bound by its own customs
and usages and that it is quite clear that the custom and practice
of the court was to deal with cases where one person used or
had used arms belonging to someone else: see Coke's Institutes,
vol. 4, c. 17, p. 125. The cases heard, as appearing from the
records of the court, fell into two main groups; those concerning
bogus arms, such as *St. George v. Tuckfield*,⁵ and *Oldys v.*
Tyllic,⁶ and those concerning disputes as to genuine arms, for
example, *Scrope v. Grosvenor*.⁷

[LORD GODDARD, referring to *Chambers v. Jennings*.⁸ Is
there any more modern authority as to the powers of the court?]

The court can only disappear by Act of Parliament. *Rex v.*
*Wells Corporation*⁹ is relied on, and see *Rex v. Mayor and Jurats*
*of Hastings*¹⁰ cited in the argument.¹¹

[LORD GODDARD. It may be that by various decisions the
court has been shorn of all its powers so that if the Earl
Marshal had not seen fit to set up the court it would have been
a good answer to an application for an order of mandamus that
there was no point in setting it up.]

If the court did not sit it might be a great injustice because
the common law courts have expressly declined all jurisdiction

⁵ (1637) Cur.Mil.Boxes 3/87, 98;
7/55; 9/4/3; 18/1a-b.

⁶ (1687) Cur.Mil.Boxes X/12/1-3;
X/23/5.

⁷ (1389) Calendar of Close Rolls,
Ric. 2, Vol. 3, 586.

⁸ (1702) 7 Mod.Rep. 125.

⁹ (1836) 4 Dowl. 562.

¹⁰ (1822) 1 D. & R. 148.

¹¹ 4 Dowl. 562, 563.

in these matters and this is the only court which has jurisdiction in relation to armorial bearings. Although the matter in dispute here seems small, the principle involved is of importance, and serious inconvenience would result if the court had no jurisdiction.

[LORD GODDARD. Has an armiger a right to allow others to use his arms?]

The only effect of permission would be to bar the armiger from taking proceedings; permission would be no answer to proceedings in which the office of the judge was promoted by one of the Kings of Arms.

The decision of the court can be enforced in three ways; by suing on the bond which the parties have presented in accordance with the practice of the court; by imprisonment by the Earl Marshal; and by a declaration that a party not complying with the sentence is in contempt, and a motion for committal in the High Court. This court is subject to orders of prohibition from the High Court and therefore the Divisional Court has an inherent jurisdiction to protect it: enforcement turns upon that fact: compare *Rex v. Editor of the Daily Mail*,¹² in particular the remarks of Avory J.¹³; see also *Rex v. Daily Herald*,¹⁴ per Lord Hewart C.J.¹⁵ In the present case the plaintiffs only ask that the defendants be enjoined.

*Russel's Case*¹⁶ and *Oldis v. Donmille*¹⁷ do not support the proposition contended for by the defendants; *Russel's Case*¹⁸ is an authority only for saying that the court has no jurisdiction in a matter with which the common law courts had power to deal; it was not concerned with an armorial bearing but with a matter impinging upon the rights of the officers of arms: see the remarks of Holt C.J. in *Chambers v. Jennings*.¹⁹ *Russel's Case*²⁰ was followed in *Oldis v. Donmille*,²¹ which goes no further to support the defendants' case: see the report in Hist. MSS. Commission, House of Lords MSS., 1695-97 (1903), vol. 2, N.S., pp. 154, 155.

A. Colin Cole for the defendants. A proper interpretation of the statute 13 Richard 2, St. 1, c. 2, excludes the present case from the jurisdiction of the court. The preamble states that the court encroaches on the common law and it sets out that the jurisdiction of the court is "to have cognizance of contracts

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¹² [1921] 2 K.B. 733.

¹³ Ibid. 750.

¹⁴ [1932] 2 K.B. 402.

¹⁵ Ibid. 412.

¹⁶ 4 Mod.Rep. 128; 1 Show. 209;
sub nom. *Russel v. Oldish*.

¹⁷ Show.P.C. 74.

¹⁸ 4 Mod.Rep. 128.

¹⁹ 7 Mod.Rep. 125, 127.

²⁰ 4 Mod.Rep. 128.

²¹ Show.P.C. 74.

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"touching deeds of arms and of war out of the realm." The expression "deeds of arms" is a translation of "faits d'armes" which clearly means "feats of arms"; that has nothing to do with armorial bearings but only with deeds of arms, performed at jousts or tournaments: see Oxford English Dictionary, heading "Deed," p. 116, 1, b. Although that first limb does not apply in this case, because the matter is within the realm, the second limb, "and also of things that touch war within the realm" (which, according to the French text,²² should read things that touch "arms or war") must be construed ejusdem generis with the first limb with regard to the jurisdiction there defined.

[LORD GODDARD. A grant of arms is made by the Kings of Arms who derive authority from the Earl Marshal; cannot the Earl Marshal protect armorial bearings in any way?]

This is the one type of case in which the Earl Marshal cannot protect armorial bearings because it does not fall within his jurisdiction. Reliance is placed on the comment in Hawkins' Pleas of the Crown (1824 ed.), Vol. 2, c. 4, pp. 13, 14: "Yet it seems 'to be taken for granted in some books that disputes concerning 'precedency, and points of honour, and satisfaction therein, are 'proper for this court . . . yet it seems to be a large interpretation to make these things relate to war, so as to come within 'the declaration above mentioned.'" It would be a large interpretation if the present matter was brought within the powers of the court as defined by the statute. See also the observations of Holt C.J. in *Chambers v. Jennings*.²³

[LORD GODDARD referred to Comyns' Digest (1764), tit. Courts, E. 2, quoted by Lord Blackburn in *Sturla v. Freccia*²⁴ and to *Ashford v. Thornton*.²⁵]

A study of the cases leads to the conclusion that this case should not be governed by previous cases because those after 1521 are bad precedents.

[LORD GODDARD. The statutes limit the power of the Constable. They do not deal with the jurisdiction of the court, but merely say that the court must not encroach upon the common law courts.]

Although between 1385 and 1410 the court did exercise jurisdiction in armorial causes it is clear that they were all such as

²² "al conestable apartient d'avoir
 "connaissance des contractz tochantz
 "fait d'armes & de guerre hors du
 "roialme & auxint des choses qe

"touchent armes ou guerre deinz le
 "roialme. . . ."

²³ 7 Mod.Rep. 125, 128.

²⁴ (1880) 5 App.Cas. 623, 628.

²⁵ (1818) 1 B. & Ald. 405.

to fall within one or other of the two limbs of the statute. The evidence of John of Gaunt in *Scrope v. Grosvenor*²⁶ is relied upon as showing that the dispute came to a head on a military expedition into Scotland in 1385. *Lovel v. Morley*,²⁷ heard at Newcastle, was also concerned with matters that arose on a military expedition into Scotland.

[LORD GODDARD. I do not see how I can hold that the court has no jurisdiction in this matter. The court has consistently throughout its history dealt with this particular subject of dispute, and writers of eminence such as Comyns, Coke and Blackstone have recognized its jurisdiction.]

The text books are by latterday commentators; in 1954 this court is entitled to take a fresh view and to go back to the source in order to ascertain its jurisdiction. Regard should be had to all the precedents. It is submitted that the jurisdiction of the court in relation to armorial bearings, on the authority of the earliest cases, only concerns disputes which arose on military expeditions either outside or within the realm, or at a tournament within the realm. The conclusion from the cases occurring after 1521, after the Constable had ceased to function, is that the court in the person of the Earl Marshal purported to act in cases in which, had the Earl Marshal and the Constable sat together, they would not have acted. Nearly all the cases are causes of office; the only two causes of instance are *Pauncefote v. Pauncefote*,²⁸ and *Perrot v. Perrocke alias Perrot*,²⁹ which are distinguishable from this case, and in which it is submitted that the court exceeded its jurisdiction.

[LORD GODDARD referred to *Stepkin v. Dobbins*.³⁰]

The law of arms as defined in the proceedings in this court in the seventeenth century is not referable to disputes such as this between corporate bodies: *Oldys v. Tyllie*³¹; *Oldys v. Booth*.³² The "usages and customs" referred to by Blackstone as supporting the claim of the court can only refer to matters concerning natural persons; the earliest record of a grant of a

²⁶ Nicolas, *Scrope and Grosvenor Roll*: being the proceedings in the cause between Richard Lord Scrope of Bolton and Sir Robert Grosvenor as to their right to arms, 1385-90 (1830), vol. 1, pp. 49-50.

²⁷ (1386-91) College of Arms MS., *Processus in Curia Marescalli*, vol. ii, pp. 21, 33.

²⁸ (1638) Cur.Mil.Boxes 18/3a.

²⁹ (1639) Cur.Mil.Boxes 2/85, 86; 5/29, 30; Acta Cur.Mil. (5), 69-76, 78, 80, 87; Cur.Mil. 1631-1642, 228-9.

³⁰ (Approx. 1638) Cur.Mil. 11. 150-169; Cur.Mil.Boxes 7/24; 13/2y.

³¹ (1687) Cur.Mil.Boxes X/12/1-3; X/23/5.

³² (1693) Cur.Mil.Boxes X.1g; X/23/35; Misc.Cur.Mil. 258-60.

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coat of arms to a corporation was in 1438, but there is no record of any cause in this court where both the parties were corporations and the arms of a corporation were the subject of the dispute.

[LORD GODDARD. If it is one of the functions of the court to protect arms, what distinction can be drawn between those of a corporation and those of a natural person?]

One would like to say none, but it is a remarkable fact that the arms of corporations, who are the greatest sufferers from infringement, have never in fact been protected.

[Reference was also made to *Grey v. Hastings*,³³ *Duck v. Mosely*,³⁴ *Oldys v. Tyllic*³⁵ and *Oldys v. Booth*.³⁶]

[LORD GODDARD. Is a coat of arms a property or a dignity?]

If it is a property it does not come within property as the common law knows it; it is more in the nature of a dignity. In *In re Sir John Rivett-Carnac's Will*³⁷ Chitty J. held that a dignity was an incorporeal hereditament within the meaning of the Settled Land Act, 1882, but it is not right to say that an armorial bearing is an incorporeal hereditament for all purposes.

Private persons are not punishable in this court for making arms contrary to heraldry; the complaint in this case relates to a display of arms as part of a scheme of decoration; a wrongful "bearing" of arms is not alleged, as it was in *Grey v. Hastings*.³⁸ On the authority of *Russel's Case*³⁹ the Divisional Court would order prohibition in respect of this cause, for there was not a wrongful "bearing or using" of arms. This is a term of art, and has been since at least 1400, and means more than mere display.

A display of the arms of another for ornamental purposes does not affect the right of the armiger because it is not necessarily an assertion of right to the arms; there are numerous examples of decorative or commemorative use; and the circumstances must be looked at to see whether it is such a display as only a person entitled to arms can make, that is, whether it amounts to a "bearing and using," an assertion of right by a person which, if he were not entitled to arms by grant or otherwise, would be a wrongful bearing and using. Wide powers were given to the visiting officers of arms by the Commissions of Visitation (see

³³ (Hen. 4.) An account of the controversy between Reginald Lord Grey of Ruthyn and Sir Edward Hastings in the Court of Chivalry in the reign of King Henry IV (1841), C. J. Young.

³⁴ (1638) Cur.Mil.Boxes 18/2a-c.

³⁵ (1687) Cur.Mil.Boxes X/12/1-3; X/23/5.

³⁶ (1693) Cur.Mil.Boxes X 1g; X/23/35; Misc.Cur.Mil. 258-60.

³⁷ (1885) 30 Ch.D. 136; 1 T.L.R. 582.

³⁸ Supra.

³⁹ 4 Mod.Rep. 128.

the Commission of Visitation in 1680, put in evidence in the *Shrewsbury Peerage Case* ⁴⁰ (Minutes of Evidence, printed in 1854, pp. 663, 664) and the Commission of 1530 (described in *Heralds and Heraldry in the Middle Ages* (1939), A. R. Wagner) yet those powers were not used to prevent a display of arms for decorative purposes: for example, no objection was taken by the visiting officer of arms to stained glass windows filled with shields not belonging to the householder but put up as decoration in Sarsdone House in Oxfordshire: see the Wood MS., ⁴¹ described in *The Visitations of the County of Oxford* (Harleian Society Publications, Vol. 5 (1871)), Turner, p. 9).

It has never been held that it is improper according to the law of arms to use the arms of another on a seal [Some Feudal Lords and their Seals, ed. Foster, De Walden Library, 1904, referred to]; the less is it improper here, where the defendants are not using the seal of another, for their name is on it, although there is a representation of the plaintiffs' arms on it as a decoration. In the fourteenth century, Thomas Percy, Bishop of Norwich, used a seal showing his own arms and also those of Henry, Duke of Lancaster, and the arms of FitzAlan and Clifford: see the Catalogue of British Heraldic Art, Burlington Fine Arts Club (1916), p. 86, Seal No. 20 (Seal of Thomas Percy, Bishop of Norwich 1355-69, attached deed dated August 17, 1367), and seal No. 38, put to a confirmation in 1397 by John Assheman, which has not his arms, but those of a stranger to the grant (p. 91).

Squibb, in reply, referred to *Wyght v. Tannere* ⁴² and the *Shrewsbury Peerage Case*, Minutes of Evidence. A coat of arms is not any form of property known to the common law; a grant is not limited to the grantee and his heirs male as in a common law grant but to the grantee "and his descendants." There is no reason why this court should not be open to bodies corporate; there were grants of arms to corporations in the Middle Ages. As to the suggestion that the Bishop of Norwich used the arms of the Duke of Lancaster on his seal, it was probably because the Duke of Lancaster was his patron, and the plaintiffs object that it should be suggested that they are the patrons of the defendants in this case.

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⁴⁰ (1857) 7 H.L.C. 1.

⁴¹ (1574) Bodleian Lib. D.14; [a photostat produced but not put in, counsel for plaintiffs accepting the

edited version of the MS. in Harl. Soc., vol. 5, 1871].

⁴² (1394) Calendar of Patent Rolls. Ric. 2 (1391-1396), p. 380.

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LORD GODDARD. As surrogate to the Earl Marshal I declare that the court has jurisdiction in this matter. I give judgment for the plaintiffs for the agreed amount of costs. The reasons for the judgment will be put into writing. I shall deliver them at an early date and by permission of the Earl Marshal I shall do so in his absence.

1955. Jan. 21. LORD GODDARD, SURROGATE. On March 1, 1842, the Kings of Arms of Her late Majesty Queen Victoria granted a coat of arms and crest to the recently incorporated borough of Manchester, since enhanced to the dignity of a city, and supporters were granted by Garter's warrant on the following day. The corporation now allege and complain that the defendants, the Manchester Palace of Varieties Ltd., have over a period of years usurped the achievement granted to them by displaying the arms above the auditorium of the theatre and by using them as their common seal. The defendants admit the allegations of fact in the libel but deny the jurisdiction of this court, first, because they say that the court can only deal with matters set forth in the statutes 8 Ric. 2, c. 5, and 13 Ric. 2, st. 1, c. 2, and that the matters alleged do not bring this case within those statutes. Secondly, they submit that judgments binding on this court have decided that private persons are not answerable to or punishable by this court in respect of such matters as are alleged in the complaint.

It is not contended that this court, however long a period may have elapsed since it last sat, is no longer known to the law. It was originally the Court of the Constable and Marshal and has probably existed since the Conquest. At least it had been in existence for very many years before the reign of Richard II, who reigned from 1377 to 1399, and during his time the famous case of *Scrope v. Grosvenor*¹ was heard before it. The hereditary office of Lord High Constable was abolished on the attainder of the Duke of Buckingham in 1521, since when the court has always been held before the Earl Marshal or his surrogate alone, and his right to hold the court and to adjudicate at least on heraldic matters was recognized and confirmed by Letters Patent of James I in 1622, and those of Charles II in 1672, which were read at the opening of this court. Its records show that frequent sittings have taken place and judgments have been given by the Earl Marshal alone acting through

¹ (1389) Calendar of Close Rolls, Ric. II, Vol. 3, 586.

his surrogate. In origin, no doubt, the court was essentially a military tribunal, the forerunner of courts-martial, which were in later years established under Articles of War issued by the Sovereign from time to time, and now are established and regulated by the Army Act. As the origin of armorial bearings was, or at least is commonly believed to have been, a method of identifying knights clothed in armour, it was natural that disputes with regard to the right to display a particular achievement on a shield should have fallen within the cognizance of this court. The power to grant armorial bearings is, as I understand it, delegated by the Sovereign to the Kings of Arms who, with their officers, were incorporated as a College of Arms in the reign of Philip and Mary. The Earl Marshal is the head and, I think, the visitor of the college. The right to bear arms is, in my opinion, to be regarded as a dignity and not as property within the true sense of that term. It is conferred by a direct grant or by descent from an ancestor to whom the arms had been originally granted. There is authority that a dignity which descends to heirs general or to heirs of the body is an incorporeal hereditament whether or not the dignity concerns lands: see *In re Sir J. Rivett-Carnac's Will*,² which related to a baronetcy. It was not contended before me that armorial bearings were an incorporeal hereditament, and in any case it is clear that the right to bear arms is not a matter cognizable by the common law, which seems to show that there is no property in arms in the legal sense, otherwise the courts of law would protect them.

Mr. Cole, in the course of a careful and learned argument, submitted that the powers of the court were defined by the statutes of Richard II referred to above, now repealed by the Statute Law Revision Act, 1881. He argued that the effect of those statutes was that the court had power to act in relation to armorial bearings only when carried to war outside the realm or displayed at a tournament within the realm and possibly if carried in an army engaged in suppressing rebellion, that is to say, in a civil war. In my opinion, however, the statutes of Richard II were intended, or at least have been so regarded, to confine this court to matters of dignity and arms, and to prevent it from entertaining matters cognizable by the ordinary courts of the kingdom. The common law courts have always been vigilant and jealous of any attempt to usurp or encroach on their jurisdiction. Many instances are to be found in the books of

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prohibitions to the Court of Admiralty and to the spiritual courts, and the liability of the latter to writs of prohibition, though not of certiorari, was fully discussed in the recent case of *Rex v. Chancellor of St. Edmundsbury and Ipswich Diocese*.³ But that this court has jurisdiction in matters relating to armorial bearings has been recognized by the highest authorities. Coke C.J. deals with the Court of Chivalry at length in the Institutes, vol. 4, chap. 17 [123]. In Comyns' Digest (1764), tit. Courts, E. 2, 485, it is said: "so the Court" [of Chivalry] "has an absolute jurisdiction, by prescription, in matters of honour, pedigree, descent "and coat armour," and this passage was quoted by Lord Blackburn without comment in *Sturla v. Freccia*.⁴ Blackstone [Commentaries, Book III, c. 5 [68]] deals with the court as an existing court though one which has, he says, by reason of its narrow and restricted jurisdiction, fallen into contempt and disuse. He points out that the statute of 13 Ric. 2 gives it cognizance touching deeds of arms together with other usages and customs to the same matters appertaining, and he said [ibid. Book III, c. 7 [103]] that the words "other usages and "customs" support the claim of the court to give relief to such of the nobility and gentry as think themselves aggrieved in matters of honour, whence it follows that its civil jurisdiction is principally in two points: that of redressing injuries of honour and correcting encroachments in matters of coat armour, precedence, and other distinctions of families.

In Hawkins' Pleas of the Crown, vol. 2, a chapter is devoted to the court, and that very learned author has no doubt, not only that the court existed, but that the absence of the constable made no difference to its jurisdiction in these matters that I have mentioned. He says, at p. 15: "Neither is it probable, that the "lord-marshal, upon the extinguishment of the hereditary office "of the constable, should from time to time . . . hold this court "by himself, without any constable, and also often be assisted "therein by the judges of the common law, unless it were then "well known that such his proceeding was warranted by the "ancient and established usage of his court; and it is very "extraordinary, that our judges and lawyers should generally "take it as a thing granted, that the marshal is at this day the "proper judge of points of honour, etc., if it were imagined that

³ [1947] K.B. 263; 62 T.L.R. 1 K.B. 195; 63 T.L.R. 523; [1947] 706; [1946] 2 All E.R. 604; [1948] 2 All E.R. 170.

⁴ (1880) 5 App.Cas. 623, 628.

“ he has no power to act without the concurrence of a constable.” Hawkins’ opinion is of particular value, as he was in practice as a serjeant at the time when this court last sat, that is, in 1737. *Chambers v. Jennings* ⁵ has been cited as authority for the proposition that the court cannot sit in the absence of the Constable, but what the court decided in that case was that the court could not entertain any longer an action for words. Slander was cognizable by the courts of common law. They were not going to have the Court of Chivalry abrogating to itself that which could be tried in the Court of Common Pleas, and they took what may perhaps be described as a short cut by saying that whatever colour there be to hold the plea of some things before the Marshal alone, there was no pretence to hold a plea of words before the court in the absence of the Constable. The explanation of *Russel’s Case* ⁶ and *Oldis v. Donmille*,⁷ in my opinion, is that the matters there complained of were an infringement of the privileges of the heralds which might result in their temporal, that is, financial loss. Therefore, there was a remedy by an action on the case and accordingly this court was prohibited.

The passage from Hawkins which I have cited in effect amounts to this, that communis opinio among lawyers is evidence of what the law is, which is the way Lord Ellenborough put it in *Isherwood v. Oldknow*,⁸ and in view of the opinions which I have cited of authors whose works are recognized as of the highest authority, I have no hesitation in holding that this court has jurisdiction to deal with complaints relating to the usurpation of armorial bearings. Blackstone, it is true, regarded the court as obsolete when he was writing not many years after its last recorded sitting, and his view is indorsed by Sir William Holdsworth in vol. 1 of his History of English Law, pp. 578 and 580. No doubt one of the reasons why the court fell into disuse was because how its decisions are to be enforced is a matter of great doubt and obscurity, but once it is established that this court exists, whatever interval may have elapsed since its last sitting, there is no way so far as I know of putting an end to it save by an Act of Parliament. There may be very good reasons for a court no longer exercising powers which were undoubted in days gone by. I may instance the powers of the spiritual courts over the laity. For centuries they exercised a very active

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⁵ (1702) 7 Mod.Rep. 125.

⁶ (1692) 4 Mod.Rep. 128.

⁷ (1695) Show.P.C. 74.

⁸ (1815) 3 M. & S. 382, 396.

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jurisdiction over laymen in so-called criminal causes, and all forms of immorality and not merely adultery were within their cognizance, "pro reformatione morum et pro salute animae." Although they have been deprived by statute of this jurisdiction with regard to many matters, for example, slander and brawling in church, still in theory they could make decrees of excommunication against an immoral layman and enjoin penance and, what is more, order costs. If I may refer to a judgment of my own on this point, I dealt with the matter at some length in *Blunt v. Park Lane Hotel Ltd.*⁹ I there endeavoured to show the reason why this jurisdiction had become obsolete and beyond recall without the intervention of a statute. It is because judgments of ecclesiastical lawyers of the highest eminence have said that such jurisdiction is not in accordance with modern thought, and ought no longer to be exercised. In the ecclesiastical courts the office of the judge cannot be promoted in a criminal cause without leave: see *Maidman v. Malpas*.¹⁰ In view of the pronouncements on this subject by Lord Penzance and others, it is unthinkable that any Diocesan Chancellor or Dean of the Arches would permit such a suit nowadays to be promoted. I refer to this matter particularly because it seems to me to indicate a method by which any abuse of this court's undoubted jurisdiction can be prevented. The surrogate of this court and the advocates who practised in it were always civilians, and there seems every reason why the practice which obtained in the courts of the civilians should apply here. If, therefore, it is laid down as a rule of this court, as I would very respectfully suggest to the Earl Marshal it should be, that leave must be obtained before any proceedings are instituted, it would, I think, prevent frivolous actions, and if this court is to sit again it should be convened only where there is some really substantial reason for the exercise of its jurisdiction. Moreover, should there be any indication of a considerable desire to institute proceedings now that this court has been revived, I am firmly of opinion that it should be put upon a statutory basis, defining its jurisdiction and the sanctions it can impose.

To deal, then, with the present complaint, two matters are alleged: the display of the arms in the auditorium of the theatre, and the use of the arms of the city as the common seal of the

⁹ [1942] 2 K.B. 253, 257; 58 T.L.R. 356; [1942] 2 All E.R. 187.

¹⁰ (1794) 1 Hag.Con. 205.

defendant company. The latter does seem to me to be a legitimate subject of complaint. The corporation of a great city can properly object to their arms being used on any seal but their own. A deed sealed with an armorial device is thereby authenticated as the act and deed of the person entitled to bear the arms. It is indeed the seal which makes a document a deed and enables an action of covenant to be maintained—a form of action far older in English law than assumpsit. For the company to use the arms of the city as its seal looks very much like an attempt to identify the company with the corporation of the city. With regard to the display in the auditorium, if that were the only complaint, I should have felt it raised a matter of some difficulty. I am by no means satisfied that nowadays it would be right for this court to be put in motion merely because some arms, whether of a corporation or of a family, have been displayed by way of decoration or embellishment. Whatever may have been the case 250 years ago, one must, I think, take into account practices and usages which have for so many years prevailed without any interference.

It is common knowledge that armorial bearings are widely used as a decoration or embellishment without complaint. To take one instance, hundreds if not thousands of inns and licensed premises throughout the land are known as the so-and-so Arms, and the achievements of a nobleman or landowner are displayed as their sign. It may be and frequently is the case that the family whose arms are thus displayed have parted with their lands in the neighbourhood and perhaps have never owned the inn or at least do so no longer. The arms of universities, colleges or dioceses displayed on tobacco jars, ash trays, teapots and other articles of domestic use are to be found in shops all over the country and are dear to the hearts of souvenir hunters, tourists, American and others, as well as seaside visitors. In strictness, I suppose none of these people has any right to use or display articles thus emblazoned. Then again, at the present day, many a gracious ancient house bears over its porch the arms of the family who built but no longer lives in it. It may be that the line is extinct; it may be that necessity has compelled a sale to another who has recently made a fortune as ample as the original builder amassed; perhaps in Cotswold wool, the slave trade, or just as an acquisitive landowner. Could this court be asked to deface the fabric by ordering the removal of the original achievement which

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has adorned the house it may be for hundreds of years? The vendor could not complain if he sold the house without first removing the device, nor can I conceive of the Attorney-General, in whom is vested such of the powers and duties of the former King's Advocate as may still remain, emulating the activities of Dr. Duck or Dr. Oldys in the seventeenth and early eighteenth centuries and seeking to have the new owner declared to be "no gentleman and disentitled to bear arms," or at least the arms thus displayed. Let me quote from Bacon's Essay on Judicature: "Let penal laws, if they have been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution."

Where, then, is one to draw the line? It can, I think, only be done by the exercise of common sense and by saying that use or display in such circumstances would not be a ground for intervention by this court. In view, however, of the use by the defendants of the arms of the city as their common seal, and the contentions which they have set up in this case, I think that the court may properly inhibit and enjoin them from any display of the corporation's arms, and accordingly I pronounce the sentence porrected by the plaintiffs, except that, subject to further argument, I should propose to delete the words "without the leave and licence of the plaintiffs." These words appear to assume that a grantee of arms can himself authorize and permit another to bear them. I am not at present satisfied that this is permissible by the law of arms, as it seems to me that it would infringe the rights of the Officers of Arms, who alone can make grants, and might deprive them of revenue.

Mr. Squibb, I should like to hear what you say about those words being deleted?

Squibb. I would not oppose the deletion; the only reason why those words were put in was to meet a possible defence of leave and licence, which might have the effect of disentitling the plaintiffs to sue. Leave and licence could not confer any right as against the world, but it might well give rise to a plea of condonation.

LORD GODDARD. That was not raised in the case.

A. Colin Cole. There is nothing that I can usefully add.

LORD GODDARD. Very well. I will take those words out. As to costs, I will take out that part of the sentence also.

Sentence accordingly.

Judgment for the plaintiffs.

Solicitors: *Philip B. Dingle, Town Clerk, Manchester; Pritchard, Englefield & Co. for Boote, Edgar & Co., Manchester.*

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C. A.

Husband and Wife—Divorce—Adultery—Meaning—Attempted sexual intercourse—Temporary impotence of man cited—No penetration—Adultery not committed.

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Holson and
Morris L.JJ.
—

The wife and the intervener attempted to have sexual intercourse, but owing to a nervous disability from which he suffered he had been unable to accomplish his purpose and there had been neither penetration nor emission:—

Held, that although, to establish adultery, it was not necessary that the complete act of sexual intercourse must be proved, some penetration of the female organ by the male organ must be found to have taken place. On the facts of the present case the court was satisfied that no penetration could have or had occurred and, therefore, the wife was not guilty of adultery.

Dictum of Lord Birkenhead L.C. in *Rutherford v. Richardson* [1923] A.C. 1, 11; 39 T.L.R. 42 explained. Karminski J.'s explanation thereof in *Sapsford v. Sapsford and Furtado* [1954] P. 394, 399; [1954] 2 All E.R. 373 approved.

Judgment of Commissioner Edgedale Q.C. affirmed.

APPEAL from Mr. Commissioner Edgedale Q.C.

The wife, Mrs. Edith Betty Dennis, petitioned for divorce on the grounds of cruelty and desertion by her husband. The husband, Samuel Dennis, by his answer, alleged adultery by the wife with an intervener, one Spillett, and also desertion by the wife. The wife filed a discretion statement in respect of the alleged adultery, but subsequently withdrew it. The case came before Mr. Commissioner Edgedale Q.C. in October, 1954, when the wife in her evidence stated that, she and Spillett having become on friendly terms, he visited her at her flat on several occasions in 1941, and on the last occasion they had agreed to